UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OMNISOURCE CORPORATION

and Case 08–CA–167138

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, LOCAL 9130-03

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DECISION

STATEMENT OF THE CASE

Paul Bogas, Administrative Law Judge. This case was tried in Mansfield, Ohio, on September 12, 13, 14, and 15, 2016. The United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, Local 9130-03 (Union or Charging Party) filed the charge on January 6, 2016, and the amended charge on May 25, 2015. The Regional Director for Region 8 of the National Labor Relations Board (NLRB or Board) issued the consolidated complaint on May 27, 2016, and the amendment to the consolidated complaint on June 2, 2016. On September 9, 2016, the Regional Director issued an order severing cases. What remains before me is case number 08-CA-167138, which alleges that OmniSource Corporation (Respondent or Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily discharging four employees at its

Mansfield, Ohio, facility because of their union and protected concerted activities. The Respondent filed a timely answer in which it denied committing any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following finds of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, processes and sells scrap metal, and from its facility in Mansfield, Ohio, annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND

The Respondent is a scrap metal recycling company with approximately 70 facilities. Steel Dynamics, Incorporated, is the parent corporation of the Respondent and the two entities have the same corporate headquarters. Seven of the Respondent's 70 facilities are unionized. None of these seven were initially organized while owned by the Respondent, but rather were unionized at the time the Respondent acquired them. The Respondent's unionized locations include the one in Mansfield, Ohio, which is the subject of this litigation. The bargaining unit at the Mansfield location has approximately 34 members, of whom 9 are truck drivers and 25 are production and maintenance employees who work in the scrap yard.

On December 18, 2015, the Respondent discharged four of its long-time employees: Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman. At the time the Respondent discharged them, Dean, Smith, and Timman were the only current union representatives employed at the Mansfield location. Dean, a bargaining unit truck driver based at the Mansfield facility had been employed by the Respondent since September 2002. He became a union official in 2012 and was the chairperson of the bargaining unit at the time the Respondent discharged him. Dean's union activities included overseeing other bargaining unit representatives, participating in the negotiations for the last two labor contracts, and attending the parties' bi-weekly labor-management committee (LMC) meetings. Smith, who worked in the scrap yard, had been employed by the Respondent since 1993, served as "bargaining unit griever" from 2003 until 2015, and was the bargaining unit's secretary when the Respondent discharged him. As unit secretary he was responsible for, inter alia, attending the LMC meetings. Timman had been employed by the Respondent since February 2003 and was the bargaining unit griever at the time the Respondent discharged him. Timman's

responsibilities as griever included filing and pursuing grievances and attending the LMC meetings. The fourth discharged employee, Thompson, was hired by the Respondent in October 2004 and at the time of his termination was a crane operator. Thompson was a member of the Union but had no position with it.

Prior to when the Respondent discharged Thompson and Timman, it had never previously disciplined them. General Counsel's Exhibit (GC) 38. The Respondent had disciplined Smith only once before – in January 2002 for failing to appear for his shift without properly notifying management. Ibid. The Respondent issued Dean a verbal warning in 2008 for incorrectly designating the time he spent undergoing a required random drug test and a 3-day suspension in 2011 for an altercation with a co-worker. Linda McKinley, the Respondent's mid-Ohio human resources manager, stated that, aside from attendance matters, none of the four employees had "a lot" of prior discipline at the time of their discharges. Transcript at Page (Tr.) 1043.

B. Charlebois Arrives at the Mansfield Facility

Robert Oney was plant manager at the Mansfield facility in 2015 and 2016. On July 7 or 8, 2015, the Respondent brought Christopher Charlebois, a more senior management official (division manager), to the facility to work with Oney and the Mansfield management team to improve safety, environmental metrics, team building and communications, and to help ensure that the Respondent was complying with the collective bargaining agreement. Once Charlebois came to the Mansfield facility, he and Oney functioned as co-managers of the facility.

Almost immediately upon Charlebois' arrival, friction developed between him and some bargaining unit employees. A regular monthly safety meeting was held on Charlebois' first day at the facility, and he attended, as did the unit employees. When Charlebois was called upon to participate in a team building game, Thompson made a comment, heard by others, along the lines of "Yeah, you should do it, because it would take a member of management to fuck it up." Thompson testified that he meant this as a humorous statement. Charlebois did not find it humorous, which is not surprising given that he was new to the facility and had never met Thompson before. Charlebois responded, "I can see you're the smart-ass in the group." Multiple employees testified that Charlebois became red-faced with anger and glared at Thompson. Charlebois testified that Thompson was pacing and behaving in a "dysfunctional" manner at the meeting. After the meeting, some employees began referring to Charlebois as "grumpy grandpa" when he was not present.

Following Charlebois' arrival, the Respondent began to more strictly enforce certain rules regarding unit employees' break time and cell phone usage, and also instituted a new policy on smoking. Union officials believed that Charlebois was responsible for these changes and at a meeting with management Smith complained that Charlebois should make such changes "gradually . . . instead of being firm all at once."

When Charlebois arrived at the Mansfield facility, there were two operating employee-management committees – one created to address safety issues and one to address trust and communication issues. Bargaining unit volunteers participated in these committees, but the Union itself had no direct role in them. When Charlebois came to the facility he began attending the employee-management committee meetings. The record shows that the Respondent implemented some, but not all, of the changes that employees recommended at the committee meetings. At some point, prior to December 2015, all of the employee-volunteers simultaneously ceased participating in the two employee-management committees. Thompson, who was one of the employee-volunteers, stated that he quit the committee because he felt that management "looked down" on the employees and did not take their complaints seriously. Thompson complained, in particular, about Charlebois who he characterized as "condescending and a bit of an intellectual bully."

C. Thompson Initiates Grievance Alleging Misconduct by Charlebois, and Respondent Terminates Employees for Allegedly Making False , Slanderous, and Defamatory Statements During the Investigation of that Grievance.

On December 18, 2015, the Respondent terminated Thompson and all three of the Mansfield union representatives – Dean, Smith, and Timman. The termination letter for each of the four individuals used the same language. The letters stated that the employees were being discharged "due to your false, slanderous, and defamatory statements you made about management, Chris Charlebois."[1] The statements referred to were made by the employees in the course of pursuing a grievance, filed by the Union on December 8, concerning alleged misconduct by Charlebois. The grievance, which was set in motion by a written statement that Thompson provided to his union representatives, involved two alleged incidents on December 7 – one in the hallway at the Mansfield offices and one in a conference room that is adjacent to that hallway. In the course of meetings with the Respondent regarding that grievance, Dean, Smith, and Timman, also gave accounts regarding Charlebois' conduct at an earlier, December 2, meeting. At some point during the investigation of the grievance regarding alleged misconduct by Charlebois, the Respondent, without notifying the Union, re-cast the investigation as one into whether the employees had engaged in misconduct while pursuing the grievance.

In addition to discharging the employees, the Respondent is paying the attorney's fees for a defamation lawsuit that Charlebois filed in the Court of Common Pleas, Summit County, Ohio, seeking compensatory and punitive damages from Dean, Smith, Thompson, Timman, and a fifth former employee, Gary Sutherland. The attorney representing Charlebois in his defamation suit against those former employees is the same one who is serving as lead trial counsel for the Respondent in this ULP proceeding.

[1] Each letter also stated that the termination was consistent with the management rights provision (Article 7) in the collective bargaining agreement. GC Exh. 6, Pages 4-5. The Respondent does not cite this provision in its brief.

1. December 2 – Alleged "Hold a Machine Gun to You" Statement.

A regularly scheduled LMC meeting was held on December 2 in the Mansfield location's conference room and lasted approximately 45 minutes. In attendance were union officials Dean, Smith, and Timman, and management officials, Charlebois, McKinley, Oney, Patrick Harte (transportation manager for the Respondent's four Ohio locations), and Curtis West (dispatcher/traffic manager at Mansfield). The conference room is a relatively small space and the eight attendees were tightly seated around an oblong conference table. Charlebois was seated between Smith and Timman, and Dean was next to Timman.

During the December 2 meeting there were, at times, multiple discrete conversations taking place simultaneously around the conference table. While the close quarters meant that everyone present was within earshot of everything said at the meeting, the evidence shows that sometimes attendees were concentrating on one conversation and did not listen to what was being said in other, simultaneous, conversations. For the purposes of this case the only significant instance of this occurred towards the end of the meeting when three discrete conversations were occurring: McKinley, Oney and Smith were discussing retirement accounts; Dean and Harte were discussing trucking issues; and Charlebois and Timman were engaged in a third discussion.

Although there is a factual dispute about a key part of the conversation between Charlebois and Timman, witnesses for both sides, including all three union representatives and management witnesses McKinley and West, agreed that the conversation included mention of "Stalin" and "Hitler." Given the testimony of witnesses for both sides on this point, I find that, during the December 2 meeting, Charlebois and Timman had a conversation during which Stalin and Hitler were mentioned.[2]

The factual dispute regarding the December 2 meeting revolves around how it came to pass that Stalin and Hitler were mentioned during a meeting between labor and management at a scrap yard facility. McKinley's testimony was that Charlebois said "You know I'm a history buff, especially World War II" and that Timman responded: "Well, so am I. Stalin." Then, according to McKinley, Charlebois said "Better than Hitler." Tr. 932. While West testified that he heard the words Stalin and Hitler, his testimony was not helpful regarding the disputed portion of the conversation because he testified that he either did not hear, or did not recall hearing, the conversation that led to Stalin and Hitler being mentioned. Tr. 700. The three union witnesses contradicted

[2] To the extent that Charlebois' testimony that he did not "recall" having any conversation at all with Timman on December 2 and did not "recall" Stalin and Hitler being mentioned on that occasion, Tr. 737, can be interpreted as a denial, his denial is not credible given, inter alia, that even human resources manager McKinley and transportation manager West confirmed those facts, and that all three union witnesses to the meeting gave consistent testimony on that point. I also find that witnesses Oney and Harte were not listening to the December 2 conversation between Charlebois and Timman since neither of them recalled the Stalin and Hitler references.

McKinley's account of how Stalin and Hitler came to be discussed. According to them, Charlebois was trying to resurrect the safety and communications committees and was encouraging Timman and Smith to participate, but they were resisting such participation. Charlebois reacted to their resistance by saying something to the effect of "What do I got to do, hold a machine gun to you guys to get something done here?" Timman responded, sarcastically, "Okay, Stalin." Then Charlebois commented that Stalin was worse than Hitler. Tr. 312-314 (Timman); Tr. 519 (Dean); Tr. 590 (Smith).

Based on my review of the entire record in this case, including the demeanor of the witnesses, and the substance of the testimonies above, I credit the testimony of Dean, Smith and Timman and find that at the December 2, 2015, LMC meeting Charlebois did ask whether it was necessary to "hold a machine gun" to employees in order to get something done. That testimony rings true because it explains how the mention of Stalin and Hitler flowed from the discussion of a labor relations topic – i.e., participation in the employee-management committees. Moreover, the testimonies of the three union witnesses were mutually corroborative and also consistent with the way people actually talk. McKinley's version of events, on the other hand, does not make a credible connection between anything that would typically be discussed at a labor relations meeting and the reference to Stalin and Hitler. According to her, Charlebois, apropos of no labor relations subject, stated that he was a history buff with a special interest in World War II. That, on its own, is improbable, but from that point McKinley's account becomes even stranger. She claims that Timman responded to Charlebois' comment by blurting out the name of a random World War II figure – "Stalin." Moreover, although there were four other management officials at the December 2 meeting, not one of them corroborated McKinley's testimony that Charlebois stated that he was a history buff with a special interest in World War II, or provided any meaningful insight into why Charlebois would have raised that subject during a LMC meeting. Not only did I consider this testimony by McKinley lacking in credibility, but based on her demeanor and testimony as a whole, I find that she was an unusually biased witness and give her testimony regarding disputed matters very little weight.

The Respondent argues that the accounts of the three union witnesses are not credible because they did not complain about Charlebois' December 2 statement until almost a week later, after Thompson initiated a grievance regarding Charlebois' December 7 conduct and statement. That contention is not persuasive. Timman credibly testified that, on December 2, he thought Charlebois' statement about holding a machine gun to employees was just a "figure of speech" and not a threat. Tr. 319-320. Similarly, Dean told McKinley that "he didn't think much of it at the time," and none of the three union officials indicated to McKinley that the statement frightened them. Tr. 986-987. In McKinley's write-up of her investigation she said that Smith told her that "any mention of guns in the workplace was unacceptable," but that he had planned to "let it slide." Putting aside the question of whether it is acceptable for a manager to talk, even in figurative terms, about holding a gun to employees, I believe that the language attributed to Charlebois, at least when viewed in isolation from his alleged misconduct on December 7, was properly understood as "a figure of speech" and while arguably a threat of some work-related repercussions was not a threat of gun violence. It is not at all suspicious to me that the three union officials would not initially choose to make an

issue of Charlebois' December 2 statement, and raise it only after Thompson's allegations regarding subsequent conduct provided reason to believe that the December 2 statement was part of a worrisome pattern. This is, in fact, consistent with what Smith told McKinley during an interview on December 8, when he explained that "he did not like the statement made about machine guns and was going to let it go until he heard about the [December 7] incident with Roy [Thompson]." Respondent's Exhibit Number (R Exh.) 9.[3] The fact that McKinley dismissed these very credible explanations for the timing of the employees' reports regarding December 2 speaks more to McKinley's bias during the investigation than to any lack of credibility on the part of employees.

In addition to finding that Charlebois did make the statement about "holding a machine gun" to employees on December 2, I find that the evidence does not show that any of the employees' falsely reported that statement to the Respondent. On December 8, Smith reported, in writing, that Charlebois said "What do I have to do hold a machine gun to you to get something done around here." On December 9, Dean provided the Respondent with a written statement that Charlebois had said "What do I have to do hold a machine gun to you to get something done," and Timman provided a written statement that the comment was "something to the effect of having to hold a machine gun to us." I find that those reports were not only honest, but substantially accurate.

It is true that other people – not the discharged employees – appear to have been spreading rumors that Charlebois had made a more extreme statement. Robert Carman, the Respondent's mid-Ohio regional manager, stated that his understanding was that all four employees had claimed that Charlebois said "we're going to stand you up and mow you down with a machine gun." However, he testified that this understanding came from Oney, not from any of the discharged employees. Tr. 827-829. At any rate, either Oney or Carman was painting with an overly broad brush in reporting that *all four* employees reported that alleged statement because *Thompson was not even at the December 2 meeting* and was not shown to have made *any* claims to the Respondent about that meeting or a machine gun comment.[4] In addition, McKinley reported that, another employee, Gary Sutherland, met with her on December 8 and said that employees were afraid because a "supervisor was threatening them with guns." Sutherland is not one of alleged discriminatees whose discharges are at-issue in this case and even if his report was inaccurate with respect to Charlebois' statements, that report cannot be held against the alleged discriminatees.[5]

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[3] The Respondent marked its exhibits as "Company" exhibits, and the Court Reporter marked the same exhibits as "Respondent" exhibits, and used the Respondent's numbering. I refer to these exhibits as Respondent's Exhibits.

[4] See *Mojave Elec. Coop*, 327 NLRB 13, 15 (1998) enfd. 206 F.3d 1183 (D.C. Cir. 2000) (Where the employer's conclusion that employee had made maliciously false report was based in good faith on exaggerated reports from intermediaries, the responsibility for the exaggeration must be borne by employer, not the employee.).

[5] See *Triple Play Sports Bar and Grille*, 361 NLRB No. 31, slip op. at 5 (2014), affd. 629 Fed. Appx. 33 (2d Cir. 2015) (employees cannot be disciplined for the unprotected comments of others, even where they were part of the same discussion).

2. Hallway Incident between Charlebois and Thompson on December 7.

In late November 2015, a malfunction led to damage to the crane that Thompson was operating. The Respondent directed Thompson to fill out a safety report regarding the incident. Thompson refused to do so, stating that employees had not been required to fill out reports in the past when they were not at-fault for damage and that he believed the Respondent was attempting to create a paper trail to justify discharging him. On December 7, the Respondent called Thompson and Timman to the conference room so that management, and in particular Charlebois, could explain to Thompson that the report was required under the Respondent's safety program and would not be used to discipline him. As Thompson walked down the hallway towards the conference room, he followed a short distance behind Timman, who was himself a short distance behind Oney. On their way to the conference room the three passed by Charlebois' office, where Charlebois was still present. Oney and Timman passed Charlebois' office without incident, but when Thompson was about to pass by, Charlebois stepped forward to encounter him in the hallway.

Charlebois and Thompson themselves are the only witnesses who testified to seeing or hearing their encounter in the hallway. Their accounts are in accord in some respects, but differ regarding key details. Both testified that Charlebois approached Thompson and reached towards him in an effort to initiate a handshake, and that Thompson refused to shake Charlebois' hand. Both Thompson and Charlebois gave substantially consistent testimony about what Charlebois said to Thompson regarding his refusal. Charlebois testified that he said "You don't want to shake a man's hand?" Thompson testified that what Charlebois said was: "What's wrong with you? You don't shake a man's hand when he puts it out in front of you?"

Beyond that, Charlebois' and Thompson's accounts regarding the encounter differ. According to the written statement that Charlebois provided to the Respondent as part of the investigation, when he exited his office and tried to shake Thompson's hand, he impeded Thompson's path insofar as "there is not enough room for two grown men to pass side by side, facing each other" in the narrow hallway. R Exh. 21, Pages 1-2; see also Tr. 921-922 (Oney describes the hallway as "kind of . . . narrow," between 3 and 4 feet wide). Charlebois stated that Thompson, in order to squeeze past, "almost hugged the wall with his back." R Exh. 21, Page 2. Charlebois testified that his "hand may have brushed" Thompson during the encounter. Tr. 713. In his written account, Charlebois said that Thompson "brushed right by" him. R Exh. 21.

Thompson testified to a more physically extreme encounter than Charlebois described. According to Thompson, when he refused to shake hands, Charlebois grabbed him by the jacket and pulled. Thompson testified that he was quickly freed from Charlebois' grip and continued down the hallway to the conference room for the meeting regarding his refusal to complete an incident report.

After carefully reviewing Charlebois' and Thompson's testimonies regarding their hallway encounter, and considering their accounts in light of the record as a whole, I do not find a basis for crediting one witness over the other regarding the contradictory portions of those accounts. No one else heard or saw the encounter and I did not find either Charlebois or Thompson more credible than the other based on their demeanor, testimony, written statements, or the record as a whole. Charlebois had an interest in the outcome of this case, as well as in a defamation lawsuit regarding some of the same operative facts, and a number of his denials, for example regarding the references to Stalin and Hitler on December 2 and the reference to dinosaurs on December 7 (discussed infra), were contradicted even by management witnesses for the Respondent. Thompson also has a personal stake in the outcome of this litigation and at times his demeanor when testifying about disputed events suggested agitation that I am concerned may have clouded his perception and/or recollection.

The Respondent argues that Charlebois should be credited over Thompson because Thompson did not raise the alleged grabbing incident at the start of the meeting that took place immediately afterwards. However, as discussed above, the subject of that meeting was the intensifying conflict over Thompson's refusal to comply with the safety program by completing a report. It is not surprising that Thompson would be focused on that conflict, and the possibility that he would be disciplined for his refusal, and would not use the opportunity to accuse Charlebois of misconduct that occurred just moments before and which Thompson had not yet had an opportunity to digest or discuss with his union representatives. Indeed, at trial, Thompson credibly testified that, during the December 7 meeting, he did not mention the hallway encounter because he was concerned about losing his job and wanted the opportunity to discuss the hallway encounter with his union representatives before bringing it up with management. Tr. 228-229. This was also consistent with what Thompson told McKinley during a December 14 interview when she asked him why he had not mentioned the hallway incident at the December 7 meeting. GC Exh. 18. Thompson's concern that he was in danger of being disciplined at the December 7 meeting was well-founded; at the meeting Charlebois warned Thompson that he would be suspended unless he completed the incident report. Here again, the fact that McKinley dismissed the employee's very credible explanation for the timing of his report is more indicative of McKinley's bias during her investigation than of a lack of credibility on the employee's part.

The Respondent also suggests that I should credit Charlebois' account over Thompsons' because no other witnesses corroborated Thompson's account. However, the fact is that no other witnesses corroborated Charlebois' account either. Indeed, none of the other trial witnesses who were present in the office complex even testified to seeing Charlebois attempt to shake Thompson's hand or to hearing Charlebois' statement about Thompson's refusal – things that both sides agree occurred. None of the other individuals were shown to have been situated in such a way that they necessarily would have seen or heard the conduct that Thompson testified about. Under the circumstances, the fact that no one else witnessed the disputed event does not buttress either side's position regarding that event.

In addition to finding that the record does not show that Thompson's account regarding the hallway encounter was false, or that Charlebois' account was true, I also find that the record does not show that Thompson, or any of the other discharged individuals, made false statements regarding the hallway encounter. The evidence shows that on December 7, Thompson notified Timman, the union official responsible for handling grievances, that Charlebois had grabbed him in the hallway earlier that day. After Thompson raised the matter with Timman, both discussed the matter with Smith, who had extensive experience handling grievances. On December 7, Thompson prepared a written statement regarding the grabbing allegation (as well as another allegation, discussed infra, regarding a statement allegedly made by Charlebois at the December 7 meeting) and this written statement was provided to the union officials. Regarding the hallway incident, Thompson wrote:

> I was walking through the hallway for a meeting with Bob[Oney] and Chris[Charlebois]. Chris stuck his hand out to shake my hand and I just kept walking. He reached out and grabbed me pulled me backwards. Said, "You don't shake a man's hand when he holds it out." He let go and I kept walking.

GC Exh. 7. Timman talked to Dean about Thompson's report, and Dean advised him to file a grievance under the parties' March 2, 2012, letter of understanding, which requires the immediate discharge of any employee or manager who engages in a "verbal or physical altercation that occurs in the workplace."[6] On December 8, Timman and Smith submitted Thompson's written statement to Oney and Charlebois, along with a grievance report, signed by Timman, that cited the letter of understanding. GC Exh. 2. Neither Thompson's written statement nor the grievance report was shown to include a false account, much less a knowingly false account, of the hallway incident.

When Timman and Smith provided the grievance report and written statement to Charlebois and Oney, Charlebois denied that he had grabbed Thompson, but confirmed that he made a statement to Thompson about refusing to shake hands. Timman and Smith then met with Thompson, and informed him that Charlebois denied grabbing him.

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[6] The body of the letter of understanding states in its entirety:

> OmniSource Corporation together with the United Steelworkers International Union agrees that altercations between co-workers, whether verbal or physical, are unacceptable on the property of the OmniSource facility.
>
> An altercation is defined as a physical threat or physical harm to any employee, hourly to hourly, management to management, and hourly to management or management to hourly employees.
>
> Both parties are committed to maintain a friendly and safe work environment for ALL employees, customers, and visitors.
>
> For this reason, any verbal or physical altercation that occurs in the workplace will result in immediate discharge for all parties involved in the altercation. Such violations will be investigated aggressively to determine if the incident should be covered by the appeal process defined in the current or any future collective bargaining agreements.
>
> Whatever the issue, please refrain from taking matters into your own hands. Contact your supervisor or the union grievance representative in order to resolve the issue.
>
> GC Exh. 3.

Thompson told them that the security cameras that were present in the hallway should be checked because the videotape would confirm that Charlebois had grabbed him. Smith believed that Thompson's insistence on checking the security cameras lent credence to his account. Smith asked plant manager Oney to review the security camera footage, which Oney agreed to do. Later, Oney told Smith (but did not state at trial) that the security camera footage failed to show what happened in the hallway. Smith testified that security camera footage had been used to show hallway activity during the investigation of an unrelated incident, but the record does not establish whether or not footage relevant to the instant case ever existed.

Thompson gave a verbal statement to the Respondent regarding the hallway incident when McKinley interviewed him about the grievance on December 14, 2015. McKinley prepared typed notes of what Thompson said about the hallway incident and the account in those notes is substantially consistent with both Thompson's trial testimony on the subject and his December 7 written statement.

On December 10, a police officer visited the facility to investigate allegations regarding Charlebois' conduct. This visit was not prompted by any of the alleged discriminatees in this case, but by another unit employee. While at the facility, the police officer interviewed Thompson. The officer's written report regarding what Thompson told him was substantially consistent with what Thompson told the Respondent and testified to at trial. The officer told Thompson that if he wanted to press charges he would have to talk to the District Attorney. Prior to his discharge, Thompson discussed his allegation with the District Attorney, who told Thompson that there was an insufficient basis for bringing an assault case

Given the above, I find that the record regarding the hallway encounter fails to show that Thompson engaged in the conduct that Respondent claims justified his termination – i.e., that he made statements that were "false, slanderous, and defamatory," and certainly not that he made statements that were deliberately or maliciously false. Regarding the three Union officials who the Respondent discharged on the same basis, the record even more clearly fails to establish that they made any "false, slanderous, and defamatory" statements regarding the hallway incident. Indeed, none of them claimed to have witnessed the hallway encounter at all. Timman explicitly told McKinley that he had not seen or heard the hallway encounter. In other words, the employee-union representatives merely conveyed, as part of the contractual grievance process, what Thompson had described to them, and asserted that the conduct he had described was a violation of the letter of understanding regarding altercations.

In addition to finding that, relative to the grabbing allegation, none of the discharged employees were shown to have engaged in the maliciously untruthful conduct that the Respondent claims as justification for the terminations, I also find that the Respondent has not shown that it had a good faith basis for believing that such misconduct occurred. McKinley was the company official who conducted the investigation of the grievance involving alleged misconduct by Charlebois. However, the record is clear that before she even began the investigation, McKinley had pre-judged the matter and that she finalized her conclusion that Thompson was lying based

on her pre-existing bias. She testified that as soon as the Union presented Thompson's allegations regarding misconduct by Charlebois, and before any investigation, she "could not believe" it was true that Charlebois had grabbed Thompson, Tr. 1000, and "didn't really believe any of it had happened," Tr. 1003. As discussed above, she dismissed Thompson's reasonable explanation for the timing of his report about the incident. She pre-judged the situation in this manner even though Thompson had been employed for over a decade and the Respondent had never once found it necessary to discipline him in the past. By her own admission, when McKinley began investigating Charlebois' conduct, she asked that all three of the eventually terminated union officials provide her with written statements, *but did not ask that Charlebois provide a written statement* because, in her words, "he's a senior executive with our company." Tr. 950-951. Thompson's pre-investigation belief that Thompson was lying about being grabbed by Charlebois could only have been changed, she testified, if there was another eyewitness who corroborated his account. Tr. 1017-1018. I note that the lack of such eyewitness evidence did not lead the Respondent to conclude merely that the it could not substantiate whether or not the grabbing incident had occurred (resulting in denial of the grievance), but led the Respondent all the way to affirmative conclusions that Charlebois had not grabbed Thompson and that Thompson was maliciously lying about it (leading not only to denial of the grievance, but to the discharge of Thompson).

Based on the record, I find that McKinley, in addition to being pre-disposed to discredit Thompson, was also unduly disposed to credit Charlebois, a high level executive of whom she appears to be somewhat in awe. While testifying, McKinley volunteered that Charlebois was a "very highly educated" "gentlem[a]n" who was "coming from a completely different area of life" than "our guys." Tr.933-934. She testified, it "warm[ed] my heart," to see a person like Charlebois engaged in a "nice" conversation with a bargaining unit employee. Tr. 933 and 1018. As discussed above, she admitted that she did not initially even ask for a written statement from Charlebois because "he's a senior executive" with the company. Based on all of the above, I find that McKinley's conclusion that Thompson was maliciously lying about the hallway encounter did not have an honest, good faith basis, but, rather, was merely an expression of her pronounced pre-existing bias. The record shows that McKinley was not interested in determining whether Charlebois had engaged in the misconduct, but rather in punishing Thompson and the other discharged employees for making an allegation of misconduct against someone who she deemed so far above their station. Without notifying the Union, she re-cast the investigation of a grievance regarding alleged misconduct by Charlebois, into an investigation of misconduct by the employees in pursuing that grievance.

McKinley eventually forwarded an investigative report, and various witness statements, to Andrew Ables, the Respondent's corporate human resources manager and the individual who made the final decision to discharge Thompson, Dean, Smith, and Timman. In reaching that decision, Ables consulted with a group of managers that included Mike Herrmann (division manager), Robert Carman (mid-Ohio regional manager), and McKinley – all of whom agreed with the discharge decision. The evidence shows that the bias against the employees was not McKinley's alone, but permeated the Respondent's investigation. Oney, the plant manager whose account

was a key part of McKinley's investigation, testified that when, before the investigation, he heard the allegation that Charlebois had grabbed Thompson he "immediately thought that it wasn't true." Tr. 895. In addition, the record shows that before McKinley interviewed the alleged discriminatees on December 14, and at a time when the Respondent purports to have been impartially attempting to ascertain the facts, Herrmann (an upper level executive) indicated to McKinley by email that he was "confident" that the employees "will not be able to coordinate the context of their lie well enough to make it believable." Tr. 1014-1016. He suggested additional questioning that he was convinced would expose them. Carman testified that all four of the alleged discriminatees were making false claims about what Charlebois said during the December 2 meeting, but Thompson was not even at that meeting and made no representations about what was said there. Carman stated that his understanding was that all four employees had claimed that Charlebois said "we're going to stand you up and mow you down with a machine gun." However, he testified that this understanding came from Oney, not from any of the discharged employees. Tr. 827-829. I find that the Respondent did not arrive at the conclusion that the employees were lying through an honest inquiry, but through one directed at rejecting the employees' complaints about Charlebois and punishing them for making those complaints.

3. Charlebois "Dinosaur" Comment at December 7 Meeting.

Following the December 7 hallway interaction, Thompson and Charlebois continued down the hallway and into the conference room for the meeting regarding Thompson's refusal to complete a report. The others present were Timman and Oney. Charlebois explained to Thompson that the report was required for the Respondent's safety program and would not be used to discipline him. Thompson continued to resist, prompting Charlebois to warn that Thompson would be suspended for insubordination if he did not complete the report.

In response to Thompson's continued resistance to completing the report, Charlebois made a statement at the meeting in which he referred to the fate that awaited "old dinosaurs." All those present at the meeting testified to hearing the dinosaur statement, although there are differences in their accounts of Charlebois' precise wording. Thompson testified that what Charlebois said was, "People are going to conform to my way, or all the old dinosaurs will be shot." Tr. 225. According to Timman's testimony, the statement was, "The old dinosaurs will comply or will be shot." Tr. 339.[7] Management witness Olney testified that what Charlebois said was, "Everyone needs to conform to the way things are heading and that some old dinosaurs may not survive." Tr. 916-917. At the hearing, Charlebois himself initially affirmed that what he said was, "Here's an example of an employee who is a dinosaur," and "some old dinosaurs may not survive." Tr.790. Then Charlebois recanted to some extent, stating that he would "never" have used the word "survive," and that what he actually said was "probably something along the line – here's an example of an employee who's a dinosaur who will be left behind." Tr.790-791. In the notes that Charlebois prepared

[7] Neither of the other two alleged discriminatees – Dean and Smith – was present at this meeting or made any claims to firsthand knowledge of what Charlebois said during it.

close in time to the event, he gave a formulation that was slightly different than either of those he testified to at trial. In his notes he reported that he had said that "dinosaurs" would "get passed by." R Exh. 21, Page 3.

Given the above, the Respondent's contention that Thompson and Timman made "false, slanderous, and defamatory statements" about what Charlebois said at the December 7 meeting depends on the difference between the statement that old dinosaurs "will be shot," and the statement that old dinosaurs either "may not survive," or "will be left behind," or will get "passed by." As discussed in the analysis section of the decision, I find that it is unnecessary to resolve the factual question of which of these very similar versions of the statement is the most accurate since the difference between them is not legally consequential under the Act.

The parties agree that Thompson completed the incident report at the December 7 meeting after Charlebois threatened to suspend him and made the comment regarding the fate of "old dinosaurs."

4. December 18: Employees Discharged

As noted earlier, on December 18, 2015, the Respondent discharged Dean, Smith, Thompson, and Timman. The Respondent took this action without notifying these individuals, or the Union, that the investigation of the union grievance alleging misconduct by Charlebois had mutated into an investigation of alleged employee misconduct in pursuing that grievance. The termination letters presented to the four individuals set forth the identical reason for the action – "false, slanderous, and defamatory statements you made about management, Chris Charlebois." Despite the long tenure of the employees, and the fact that none of the four had, even in McKinley's estimation, "a lot" of prior discipline,[8] the deliberations of the full-group of managers did not include any discussion of the employees' favorable disciplinary histories or of the possibility of imposing discipline short of termination. Tr. 844-847. The ultimate decision to discharge the employees was made by Ables, after consulting with Herrmann, Carman, and McKinley – all of whom supported the decision. Based on the record in this case, and as discussed in the section of this decision addressing the hallway encounter, I find that their view that the alleged discriminatees had made slanderous statements was the product of bias, not honest inquiry.[9]

[8] Timman and Thompson had no history of prior discipline at all during their decade-plus employment with the Respondent. Smith had been disciplined only once, for an attendance matter over a decade earlier. Dean had been disciplined in 2008 for a time and attendance reporting issue, and in 2011 for an altercation with a co-worker.

[9] The Respondent unilaterally arranged for a polygraph examination of Charlebois, and this examination was conducted on February 5, 2016. The Respondent offered evidence regarding the examination at the hearing, and the General Counsel objected. While I permitted the Respondent to present the polygraph evidence, I stated that I would decide what, if any, weight it was appropriate to give that evidence once the parties had had an opportunity to present arguments on the subject in their post hearing briefs. After considering the matter, I have determined that it is not appropriate to give the evidence of the polygraph examination any weight. I note, at the outset, that since the examination was given well after the Respondent terminated the alleged discriminatees it cannot logically be used to evaluate the honesty of the Respondent's investigative efforts or decision-making

D. COMPLAINT ALLEGATION

The complaint alleges that, on about December 18, 2015, the Respondent violated Section 8(a)(3) and (1) by discriminatorily discharging employees Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman because they supported and assisted the Union and engaged in concerted activities.

III. ANALYSIS AND DISCUSSION

The Supreme Court has stated that "no one doubts that the processing of a grievance" to assert a contractual right "is concerted activity within the meaning of Section 7" of the Act.[10] *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). Union officials engage in protected activity when they fulfill their role in processing an employee grievance. *Union Fork & Hoe Co*., 241 NLRB 907, 908 (1979). Indeed, the protection afforded to union representatives who are processing a grievance is robust

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process. At any rate, the case law shows that polygraph evidence is viewed with extreme skepticism in federal proceedings. In *United States v. Scheffer,* the Supreme Court upheld a per se rule excluding all polygraph evidence in court martial proceedings. 523 U.S. 303 (1998). The Court stated that "there is simply no consensus that polygraph evidence is reliable." Id. at 309. The Court cited a number of studies on the issue, including one which found that the accuracy of polygraph examinations is "'little better than could be obtained by the toss of a coin.'" Id. at 310, quoting Iacono & Lykken, 1 Modern Scientific Evidence, Section 14-5.3 (1997). The Court of Appeals for the D.C. Circuit – one of the two circuit courts that could be called upon to review the instant matter – has adopted a per se rule excluding all polygraph evidence as unreliable. *United States v. Skeens,* 494 F.2d 1050, 1053 (D.C. Cir. 1974). The other circuit court where this matter could eventually be reviewed, the Court of Appeals for the Sixth Circuit, has repeatedly stated that it disfavors the admission of polygraph evidence, *King v. Trippet*, 192 F.3d 517, 523-524 & n. 3 (6th Cir. 1999), and has expressed its long held opinion that polygraph evidence is "inherently unreliable," *U.S. v. Scarborough,* 43 F.3d 1021,1026 (6th Cir.1994).

Any possibility that it might be appropriate to give weight to the polygraph evidence in this case is eliminated by the specific circumstances present here. The Respondent arranged for the polygraph examination unilaterally, meaning that the adverse parties had no opportunity to participate to ensure that the examination was conducted in an impartial manner. The Sixth Circuit has repeatedly held that unilaterally obtained polygraph evidence is too unreliable to be admitted. *King v. Trippet*, supra: *United States v. Sherlin*, 67 F.3d 1208, 1216-1217 (6th Cir. 1995), cert. denied 516 U.S. 1082 (1996); *Conti v. Commissioner of Internal Revenue*, 39 F.3d 658, 663 (6th Cir. 1994), cert. denied 514 U.S. 1082 (1995). I give no weight to the unilaterally administered polygraph examination arranged by the Respondent in an effort to buttress the testimony of Charlebois.

Moreover, the specific examination results regarding the alleged threats are particularly unhelpful here. The questions that the polygraph examiner asked Charlebois about his disputed statements were whether he had threatened to shoot anyone, point a gun at anyone, or line up people and shoot them. R Exh. 17. The examiner found Charlebois' denials on this score truthful. However, the examiner stated that he would have found Charlebois' denial truthful even if, as reported by Timman and Thompson, Charlebois had said that "old dinosaurs will be shot," since a statement threatening to shoot "anyone" or "people" is not the same as one to shoot "dinosaurs." Tr. 494-495.

[10] Section 7 of the Act provides that employees have the right, inter alia, to "assist labor organizations" and "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. Sec. 157.

and is not lost even if the representatives engage in misconduct, "unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure," *Roemer Indus.*, *Inc.* 362 NLRB No. 96 (2015), quoting Clara *Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976), and "is so violent or of such character as to render the employee unfit for further service." *Union Fork*, supra. The Act's protection extends beyond the grievance process to employee complaints about supervisors' treatment of them. *Calvin D. Johnson Nursing Home*, 261 NLRB 289, n. 2 (1982); *Avalon-Carver Community Center*, 255 NLRB 1064 (1981); *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309 (1975), enfd. 544 F.2d 320 (7th Cir. 1976); see also *Ishikawa Gasket Am. Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

The Respondent contends that it lawfully discharged Dean, Smith, Thompson, and Timman, for making slanderous statements about Charlebois' conduct towards employees. There is no doubt that the allegedly slanderous statements that the Respondent relies on were made by those employees in the course of protected activity. The employees' activity was protected both because they were asserting a contractual right through the grievance process and because they were complaining about a supervisor's treatment of unit employees. The protection extends, as well, to statements that Thompson made to law enforcement officers regarding Charlebois' workplace conduct because "[i]t has long been recognized that bringing a complaint or grievance to the attention of public authorities is also protected activity." *Marathon Oil Co.*, 195 NLRB 365, 367 (1972), enfd. 478 F.2d 1405 (7th Cir. 1973).

Under the standards set forth above, Respondent could not lawfully discipline any of those employees for making inaccurate statements in the course of their protected activity, unless those statements were deliberately or maliciously false. *Universal Fuels*, 298 NLRB 254, 255 (1990); *Walls Mfg. Co.*, 137 NLRB 1317 (1962); see also *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994) (An employer may not "restrict employees in the exercise of their Section 7 rights by prohibiting statements which are merely false, as distinguished from those which are maliciously so."). In addition, since the statements by the three union representatives were made in the context of the grievance procedure, discipline was unlawful unless any such statements rose to the level of misconduct that was "extraordinary, obnoxious, wholly unjustified, and [a] depart[ure] from the *res gestae* of the grievance procedure," and so "violent or of such character as to render the employee unfit for further service." *Roemer, Indus.*, supra; *Union Fork*, supra; *Clara Barton Terrace*, supra.

Where, as here, the employer takes adverse action against an employee for alleged misconduct occurring during the course of the employee's known protected activities, the employer has the burden, under the U.S. Supreme Court's analysis in *Burnup & Sims*, of showing that it had an honest belief that the employee engaged in misconduct that stripped the employee's activity of its statutory protection. *Modern Mgmt. Servs. LLC*, 361 NLRB No. 24 (2014), citing *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Akal Security, Inc.,* 354 NLRB 122, 124-125 (2009), reaffd. 355 NLRB 584 (2010). Therefore, pursuant to *Universal Fuels*, and *Walls Mfg.*, the Respondent must show an honest belief not only that the employees' reports were

inaccurate, but that their reports were deliberately or maliciously false. In the case of the three union representatives, the Respondent must show, in addition, an honest belief that the statements were wholly unjustified, beyond the *res gestae* of the grievance procedure, and so violent or of such character as to render those employees unfit for further service. If the Respondent meets the burden of showing this honest belief, its actions are still a violation of the Act if the General Counsel shows by a preponderance of the evidence that the employees did not, in fact, engage in misconduct of that extreme character. *Modern Mgmt. Servs.*, supra, citing *Pepsi-Cola Co.*, 330 NLRB 474 (2000); *Wittek Industries*, 313 NLRB 579, n.2 (1993). As discussed below, I find that under these standards, the Respondent clearly violated Section 8(a)(3) and (1) of the Act when it discharged the employees for the statements they made as part of their protected union and concerted activity.

The Respondent proffers three instances of what it asserts are deliberate or malicious falsehoods that remove the employees' conduct from the Act's protection. First, the Respondent alleges that the employees maliciously lied when they reported that, during a meeting on December 2, Charlebois asked whether it was necessary to "hold a machine gun" to employees in order to get something done. This alleged justification applies to union officials Dean, Smith, and Timman, but not to employee Thompson who was not present at the December 2 meeting and made no reports about the statement. Even assuming that the Respondent could demonstrate that it had an honest belief that the three union representatives not only deliberately or maliciously lied, but engaged in wholly unjustified conduct that went beyond the *res gestae* of the grievance procedure when they reported Charlebois' statement, the Respondent's defense fails because the employees accurately reported what Charlebois said. *Modern Mgmt. Servs.*, supra; *Pepsi-Cola Co.*, supra; *Wittek Industries,* supra. Specifically, a preponderance of the evidence shows that Charlebois did, on December 2, react to employees' reluctance to volunteer for the employee-management committees by asking whether it was necessary to hold a machine gun to their heads to get something done. The discharged employees' truthful reports about Charlebois' statement, which they communicated in the course protected activity, is not a lawful basis for discharging them regardless of whether the Respondent incorrectly believed those reports were maliciously false, or of whether management officials found them distasteful.

I note that, with respect to Dean and Smith, their account regarding the "machine gun" comment is the only alleged malicious falsehood that the Respondent can reasonably attempt to attribute to them. Neither of those individuals was a witness to the other conduct by Charlebois, or claimed to have firsthand knowledge regarding it. The record does not show circumstances that would justify holding Dean and Smith responsible for the allegedly unprotected statements of others. *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. at 5. Therefore, at this point in the analysis I find that, under the standards set forth above, the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Dean and Smith for statements they made in the course of protected activity. *Burnup & Sims, Inc.*, supra, *Modern Mgmt. Servs.*, supra, *Pepsi-Cola, Co.*, supra, *Universal Fuels*, supra; *Walls Mfg. Co.*, supra.

Second, the Respondent contends that Thompson's report that Charlebois grabbed him in the hallway on December 7 justifies his discharge. As discussed above, Thompson's grievance report was made in the context of protected activity and therefore the Respondent has the burden of showing that it had an honest belief that Thompson's report was not only untrue, but deliberately or maliciously false. *Burnup & Sims*, supra; *Modern Mgmt. Servs.*, supra, *Walls Mfg. Co.*, supra. For the reasons discussed in the statement of facts, I find that the Respondent has not met that burden. The record shows that the Respondent's supposedly "honest belief" was largely an expression of McKinley's pre-existing bias and indignation that an employee would make an accusation against a manager who McKinley viewed as far above the employee's station. Carman, one of the management officials who participated in making the discharge decision, and supported it, mistakenly believed, based on what Oney told him, that all four employees, including Thompson, had asserted that Charlebois threatened that "we're going to stand you up and mow you down with a machine gun." Oney's report is exaggerated not only in the sense that none of the four alleged discriminatees recounted that extreme version of Charlebois' comment, but also in that one of the four, i.e., Thompson, was not even a witness to the machine gun comment and made no report regarding it. Where an employer's conclusion that an employee made a maliciously false statement is based on the exaggerated reports of intermediaries regarding what the employee said, as is the case here, the responsibility for the exaggeration must be borne by employer, not the employee. *Mojave Elec. Coop*, 327 NLRB at 15.

As also found above, bias permeated the decision making process that led to the discharges. The Respondent never even gave the employees notice that it was investigating them for misconduct, rather than investigating the employees' grievance regarding alleged misconduct by Charlebois. During the supposedly open-minded portion of the investigation, Herrmann (one of the decision making group) stated that he was "confident" that the employees were lying and suggested a strategy for showing that this was the case. An employer does not have an "honest belief" that employees engaged in misconduct where the employer's belief was not the result of an open-minded inquiry, *Wells Aluminum Corp.*, 319 NLRB 798, 813 (1995), revd. and remanded 113 F.3d 1236 (6th Cir. 1997), or was formed "on the basis of an inquiry conducted in a partial and superficial manner," Orleans *Mfg. Co., Inc.*, 170 NLRB 220, 226-227 (1968), enfd. 412 F.2d 94 (2d Cir. 1969). The Respondent's belief that Thompson was deliberately or maliciously lying was based on an inquiry that was neither open-minded nor impartial and therefore the Respondent has not met its burden of showing that its belief was "honest."

Assuming that, contrary to my findings, one assumes that the Respondent had an honest belief that Thompson's report about Charlebois' hallway conduct was untrue, the General Counsel has still established a violation because any inaccuracies that arguably might exist in Thompson's report about Charlebois' hallway conduct do not, in fact, rise to the level of deliberate or malicious falsehoods that can remove such reports from the protection afforded to complaints about the treatment of employees. *Universal Fuels*, supra; *Walls Mfg.*, supra. Even according to Charlebois' account: Charlebois stepped out of his office in order to confront Thompson in the hallway; Charlebois stood

in a way that impeded Thompson from continuing down the hallway; Charlebois reached towards Thompson; Thompson "hugged" the wall in an effort to avoid Charlebois; and the two men brushed, or may have brushed, each other, during the encounter. Assuming that Charlebois' report gets every detail of the encounter right (something I consider unlikely given other demonstrated shortcomings in his testimony), his description was not far enough removed from what Thompson reported as to render Thompson's own account a deliberate or malicious lie, especially given the emotionally charged context, the close physical nature of the encounter, and the contact that Thompson, even under Charlebois' version, had with the hallway wall and likely with Charlebois himself, while squeezing between them. Any arguable inaccuracies in Thompson's report were, at most, "good-faith misstatements or incomplete statements, not malicious falsehoods justifying removal of the Act's protection." *MasTec*, 357 NLRB No. 17, slip op. at 6; see also *Cincinnati Suburban Press*, 289 NLRB 966, 967–968 (1988) (an inaccurate communication does not lose the protection of the Act unless it is sufficiently reckless or maliciously untrue). Thus, under the applicable standards, even if the Respondent had an "honest" belief that Thompson's account was not accurate, under the circumstances present here that would not remove those statements from the Act's protection. "Protection is not lost simply because the employee imparts information that "is not entirely accurate, or is exaggerated or objectionable to the employer, provided, of course, the information is not deliberately false or maliciously inspired. Were it otherwise, the freedom of expression and communication enjoyed by employees, unions, and employers alike would be very tenuous and dubious." *United Aircraft Corp.*, 139 NLRB 39, 46 (1962).

The Respondent's remaining example of a supposedly deliberate or malicious falsehood is Thompson's and Timman's report that, at the December 7 meeting, Charlebois said that people would have to comply with the way things are being done or "old dinosaurs" "will be shot." As discussed in the statement of facts, both the General Counsel's and the Respondent's witnesses agree that Charlebois made a statement about the unhappy fate that awaited "old dinosaurs." The Respondent's claim that the employees' version was maliciously false is based on the difference between their version, i.e., "old dinosaurs will be shot," and the various versions given by the two management witnesses, i.e., "old dinosaurs will not survive," or old dinosaurs "will be passed by," or old dinosaurs "may be left behind." Regardless of which, if any, of these versions is completely accurate, the differences between them is not nearly consequential enough to permit a finding of malicious or deliberate lying. *MasTec*, supra; *Cincinnati Suburban Press*, supra; *United Aircraft Corp.*, supra. Such discrepancies in the accounts of honest witnesses regarding the precise wording used at meetings are commonplace and all but unavoidable. Indeed, there were comparable discrepancies between management witness Oney's testimony (dinosaurs may "not survive") and Charlebois' testimony (claiming he would "never" have used the word "survive") and even within Charlebois' own trial testimony and between Charlebois' trial testimony and what he set forth in his written report during the investigation (dinosaurs will "not survive" versus dinosaurs may be "left behind" versus dinosaurs will "get passed by"). Based on my review of the record as a whole, I find by a preponderance of the evidence that the discrepancies discussed above were not the result of deliberate or

malicious misrepresentations by Thompson or Timman.[11] In the case of Timman – a union representative fulfilling his duty under the grievance procedure – those discrepancies clearly did not meet the further requirement of rendering his report wholly unjustified and beyond the res gestae of the grievance procedure. *Roemer, Indus.*, supra; *Union Fork*, supra.

I note, moreover, that in all the accounts, Charlebois made a statement about what would happen to "old dinosaurs," not what would happen to people. Such a statement is idiomatic, not literal. It refers to persons or things that are no longer useful or are becoming obsolete.[12] While all of the versions of his statement would reasonably be perceived by employees as threats of job-related consequences, none of the versions constituted a threat that Charlebois actually intended to enforce a *safety* program by *shooting* non-complying employees.[13]

For reasons discussed above, I find that the Respondent has not shown that it had an honest belief that Thompson and Timman were guilty of making maliciously or deliberately false statements when they reported the "old dinosaurs" threat. Assuming that the Respondent had such a belief, the General Counsel has still shown a violation

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[11] McKinley testified that Timman's report that Charlebois had said old dinosaurs would be "shot" was inconsistent with his initial statement to her on the subject. According to McKinley, when she interrogated him on December 8, Timman said "I might have heard something about dinosaurs, but I don't remember anything about shooting." Tr. 945. As discussed earlier, I found McKinley to be a very biased witness and I consider her testimony regarding the December 8 meeting self-serving and unreliable. Moreover, her testimony about what Timman told her was uncertain on its face – she stated that it was her "recall" and "not verbatim." Ibid. At any rate, the difference between the versions is not significant insofar as Charlebois' threat is substantially the same regardless of whether one believes that he said the old dinosaurs would be shot, or that old dinosaurs would not survive, or that he used one of the other similar formulations that Charlebois reported.

[12] See Farlex Dictionary of Idioms (downloaded 11/29/16) (defining "go the way of the dinosaur(s)" as meaning "To become extinct, obsolete, old-fashioned, or no longer in common use"); and Cambridge English Dictionary (downloaded 11/29/16) ("Dinosaur" is used disapprovingly to refer to "an old-fashioned person or thing person or thing that people no longer consider to be useful.").

[13] The Respondent discusses evidence that, during the grievance proceeding, Donnie Blatt – a union business manager who is not an employee of the Respondent and is neither an alleged discriminatee nor a firsthand witness to any of Charlebois' alleged misconduct on December 2 and 7 – argued that Charlebois had violated the letter of understanding regarding "altercations" and that this warranted either removing Charlebois or reinstating two union employees discharged for similar violations. The December 8 grievance, which is signed by Timman, also references the letter of understanding. Regardless of whether the arguments about the applicability of the letter of understanding had merit, the evidence shows that neither Thompson nor Timman, nor any of the other discharged individuals, gave deliberately or maliciously false accounts of what Charlebois said and did. At any rate, as discussed above, statements that union officials make while processing a grievance are afforded robust protection and do not lose that protection even if they are exaggerated or inaccurate as long as they are not wholly unjustified and beyond the *res gestae* of the grievance procedure. *Roemer Indus.*, supra; *Union Fork*, supra; *Clara Barton Terrace Convalescent Center*, supra. Similarly, the Respondent notes that Sutherland complained to McKinley that a "supervisor was threatening them with guns." Sutherland, like Blatt, is not one of the employees who the complaint alleges the Respondent discriminated against. Under the circumstances present here, any improper statements that Blatt and Sutherland may arguably have made are their own, and do not provide a lawful basis for discharging Dean, Smith Thompson, or Timman. See *Triple Play Sports*, supra, slip op. at 5.

pursuant to *Burnup*, supra, since the evidence shows that, even if Thompson's or Timman's account of the threat was not entirely accurate, any inaccuracies were not deliberate or malicious, but, at most, examples of the type of exaggerations and incorrect information that the Board has held insufficient to vitiate the Act's protection. *United Aircraft*, supra; *Jimmy John's*, supra; *Universal Fuels*, supra; and *Walls Mfg.*, supra.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(3) and (1) when, on December 18, 2015, it discharged employees Thompson and Timman.

The ferocity of management's response to the Union's grievance in this case is, in my view, shocking. Rather than simply accepting or rejecting the grievance, the Respondent discharged every one of the employees involved with pursuing that grievance. All of those individuals were long-term employees of the Respondent, and they included every current union representative at the facility. The Respondent did not stop there, but also funded a defamation lawsuit seeking to extract monetary damages from the discharged workers. Although a showing of employer animus against protected union or concerted activity is not part of the legal analysis under the circumstances present here, I note that the ferocity of the Respondent's actions is hard to fathom in the absence of a commitment on its part to chilling protected activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, Local 9130-03 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act on December 18, 2015, when it discharged employees Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman, must offer them reinstatement and make them whole for any loss of earnings and other benefits resulting from that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatees for the adverse tax consequences, if any,

of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).[14]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[15]

ORDER

The Respondent, OmniSource Corporation, Mansfield, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, Local 9130-03 (the Union), or any other union, or for otherwise engaging in activity protected by Section 7.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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[14] The General Counsel also asks that the Respondent be ordered to reimburse the discharged employees for all search-for-work and work-related expenses regardless of whether the discriminatees received interim earnings in excess of these expenses overall or in any given quarter, and further to pay for all consequential damages incurred by the discriminatees as a result of the Respondent's unlawful conduct. I cannot order these remedies because doing would be contrary to existing Board precedent. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2, fn. 2 (2016), *Webco Industries*, 340 NLRB 10, 16 (2003), *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Mansfield, Ohio, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region Eight after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 13, 2017.

PAUL BOGAS
Administrative Law Judge

16 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, Local 9130-03 (the Union), or any other union, or for otherwise engaging in activity protected by Section 7

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

OmniSource Corporation

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086

(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-167138 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3740.